IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1111

JULIUS GERZOF, also known as JULIUS M. GERZOF,
Plaintiff-Appellant,

against

FRANK A. GULOTTA, individually and as Presiding Justice, Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, J. IRWIN SHAPIRO, MARCUS G. CHRIST, FRED J. MUNDER, JOHN P. COHALAN, JR., JAMES D. HOPKINS, ARTHUR D. BRENNAN, A. DAVID BENJAMIN, HENRY J. LATHAM, M. HENRY MARTUSCELLO, individually and as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and IRVING N. SELKIN, individually and as Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

JURISDICTIONAL STATEMENT AND APPENDICES

ANGELO T. COMETA
Attorney for Plaintiff-Appellant
40 West 57th Street
New York, New York 10019

Of Counsel:
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
KENNETH DAVID BURROWS

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JURISDICTIONAL STATEMENT

This is an appeal from an order and judgment of a divided three-judge United States District Court of the Eastern District of New York, entered on October 16, 1975,

which dismissed appellant's action for declaratory and injunctive relief on the merits. Appellant submits this statement to show that this Court has jurisdiction of this appeal, and that substantial questions are presented.

Opinions Below

The opinions of the Court below have not yet been reported. The text of the majority opinions of Judges Moore and Neaher is set out in the separately printed appendix (1a-33a). Judge Moore's separate concurring opinion is set out at pages 34a-37a of the appendix, and Judge Weinstein's dissenting opinion is set out at pages 38a-106a of the same appendix.

Jurisdiction

This suit was brought by appellant against the justices and the clerk of the Appellate Division, Second Judicial Department of the State of New York for injunctive and declaratory relief against the enforcement of Section 90 of the New York State Judiciary Law, 29 McKinney's (1968), upon the ground that that statute denied appellant due process and equal protection of law in violation of the XIVth Amendment of the United States Constitution.

Jurisdiction was alleged under the authority of 42 U.S.C. §1983, the XIVth Amendment to the United States Constitution and 28 U.S.C. §1343. A three-judge district court was convened pursuant to 28 U.S.C. §§2281, 2284. The order and judgment of the Court below denying appel-

lant's application for injunctive relief and granting appellees' cross-motion to dismiss the complaint was entered on October 16, 1975 (107a-108a). The notice of appeal was filed in the United States District Court for the Eastern District of New York on December 8, 1975 (109a-110a).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253. That statute has recently been construed by this Court to authorize a direct appeal from an order of a three-judge District Court:

> "* * * denying interlocutory or permanent injunctive relief only where such order rests upon the merits of the constitutional claim presented below." *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Although in the majority opinion below, Judge Neaher posited abstention as an alternate basis for dismissing the complaint (27a), he did so only after expressly reaching and ruling (albeit unfavorably) on the merits of appellant's constitutional claim (17a-27a). Judge Moore, the other member of the majority below voted to dismiss *only* on the merits (34a); in fact, he issued a separate concurring opinion in order to insure that the majority decision would not be misinterpreted, in the light of *MTM* to foreclose a direct appeal to this Court since he found the presence of a

> "* * * *constitutional* question * * * of sufficient importance to be resolved by our highest Court * * *." (Emphasis added.) (43a)

Judge Weinstein's dissenting opinion, of course, reached the merits and resolved them in appellant's favor (38a-106a).

Thus the Court below, rather than abstaining, reached and resolved the merits of appellant's constitutional claims and, therefore, the jurisdiction of this Court to review the judgment on direct appeal is sustained by *MTM, Inc.* v. *Baxley, supra.*

Statutes Involved

The statute of state-wide applicability against which injunctive and declaratory relief is sought is New York Judiciary Law §90, 29 McKinney's (1968), set forth in the appendix (111a-113a).

This case also involves Article VI, Section 3, of the New York State Constitution, 2 McKinney's (1968); Sections 5501(b) and 5601 of the New York Civil Practice Law and Rules, 7B McKinney's (1963); the XIVth Amendment to the United States Constitution; and Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983. The text of these statutes is also set forth in the appendix (113a-119a).

Questions Presented

1. Does the due process clause of the XIVth Amendment entitle an attorney-respondent in a disciplinary proceeding to a meaningful opportunity to be heard before and to present evidence to the trier of the facts?

2. Does the due process clause of the XIVth Amendment entitle a disciplined attorney to a statement of explanation or reasons from the Court imposing discipline upon him?

3. Does the due process clause of the XIVth Amendment require that an attorney who is disciplined without being first accorded a full, fair and meaningful opportunity to be heard in his own defense, be granted at least one appellate review of the questions of law and fact passed on by the Court imposing discipline upon him?

4. Does the equal protection clause of the XIVth Amendment permit a State to deny appellate review as of right to disciplined attorneys on questions of law and fact arising out of the disciplinary procedure despite the fact that it grants at least one appeal as of right to every other class of litigant and every other disciplined professional?

Statement of the Case

Julius Gerzof—appellant herein—is an attorney with a distinguished record of practice at the Bar of the State of New York for 40 years.

The appellees herein are the justices and the clerk of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department (hereinafter referred to collectively as "Second Department" or "Appellate Division"). Each of the four Appellate Divisions of the New York State Supreme Court is vested with exclusive jurisdiction over the discipline of attorneys within its geographical area.

On September 9, 1974 appellant was suspended by the Appellate Division from the practice of law in the State of New York for a period of three years and until the further order of the Court. *Matter of Gerzof,*

45 A.D.2d 450, 359 N.Y.S.2d 76 (2d Dep't 1974). Mr. Gerzof's suspension was based on charges arising out of an inquiry into the activities of a former New York State Supreme Court Justice—Michael M. D'Auria. Appellant had been charged with soliciting and advising two other attorneys to reduce their legal fee on a zoning application in order to make available a sum of money to be used improperly to assure the granting of that application. He was also charged with falsely denying such solicitation while under oath as a witness during the inquiry. A Justice of the New York State Supreme Court who was designated to act as a referee to inquire and report in the proceeding against appellant, reported that the charges were substantiated by the evidence. Subsequently, appellant made an application to reopen the hearing for the purpose of taking additional, newly-discovered evidence which motion was denied by appellees who, thereafter, affirmed the referee's report without explanation. *Matter of Gerzof, supra.*

Charging that the evidence against him was both legally and factually insufficient to sustain the charges against him, unsupported by the evidence, and replete with inconsistencies, appellant unsuccessfully sought first to appeal as of right to the Court of Appeals, then leave to appeal to the Court of Appeals from the Appellate Division, and finally leave to appeal from the Court of Appeals itself. 35 N.Y. 644, 362 N.Y.S.2d 1026 (1974).

After exhausting his State appeals, appellant commenced this action seeking injunctive and declaratory relief against Section 90 of the Judiciary Law of the State of New York, 29 McKinney's (1969). Pursuant to 28

U.S.C. §§2281, 2284 a three-judge district court was convened to hear this case.*

On October 16, 1975, the three-judge court denied injunctive relief and dismissed the complaint over the dissent of Judge Weinstein, but unanimously agreed to continue the stay of Gerzof's suspension pending disposition of this case on appeal since "serious procedural and substantive issues are presented" (33a).

The Questions Are Substantial

I—The Disciplinary Process in New York State

Section 90 of the New York Judiciary Law, 29 McKinney's (1968) governs New York's procedures for disciplining attorneys, and although each Department of the Appellate Division has exclusive jurisdiction within their respective geographical areas to say what constitutes professional misconduct, *Erie County Water Authority* v. *Western New York Water Co.*, 304 N.Y. 342, 107 N.E.2d 479 (1952), *cert. denied*, 344 U.S. 892 (1952), and although each has adopted somewhat varying procedures to carry out the mandate of §90,** those procedures, as Judge Weinstein observed b[illegible], are "* * * fairly uniform throughout the State" (40a).

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* Two cases raising claims similar to Gerzof's were consolidated for the purpose of hearing before the same three-judge District Court. Plaintiffs in those cases have filed appeals to this Court from the decision below. *Levin* v. *Gulotta*, 75-856, Jurisdictional Statement filed December 18, 1975, 44 L.W. 3379; *Mildner* v. *Gulotta*, 75-972, Jurisdictional Statement filed January 9, 1976, 44 L.W. 3417.

** *See*, 22 N.Y.C.R.R. (Judiciary) §§603.1-603.5, 603.9-603.14 (1st Dep't); 691.1-691.11 (2nd Dep't); 800.28-800.31 (3rd Dep't); 1022.17-1022.29 (4th Dep't).

Subsection 6 of §90 requires that before an attorney may be disciplined he must be given notice of the charges against him and must be provided with "an opportunity of being heard in his defense". However, the statute nowhere specifies either the nature and form of such a hearing or even by whom it must be conducted. There is no doubt, however, and the Court below found that:

> "* * * the ultimate responsibility for adjudicating disciplinary proceedings rests with the several Appellate Divisions, subject only to limited appeal to the New York Court of Appeals in certain classes of cases." (13a-14a)

The Appellate Division of each Department receives complaints against individual attorneys both from bar associations and in this case, from the Judicial Inquiry on Professional Conduct, a body appointed and staffed by the Appellate Division.

Where the complaint appears to warrant further action, the Appellate Division refers the charges to a referee who, in the case of the Second Department, invariably is a justice of the State Supreme Court. However, despite his judicial character, a referee appointed in disciplinary proceedings is appointed solely to inquire and report. New York CPLR §4001, 7B McKinney's (1963).

The referee conducts the only proceeding at which an accused attorney has an opportunity to appear, argue, cross-examine or confront the witnesses against him. Yet despite the fact that this is the only adversary hearing held at any point in the disciplinary process, the referee does no more than report his determination to the Appellate Divi-

sion. As a referee to inquire and report he has no power to decide, New York CPLR §§4001, 4201, 4320, 7B McKinney's (1963), or to dismiss the charges even if he should find them totally unsupported by the evidence. *Matter of O'Neil,* 184 App.Div. 75, 171 N.Y.S. 514 (1st Dep't 1918).

Since his function is only to inquire and report, his conclusion is in no way binding on the Appellate Division which, as the Court of first instance, must itself determine whether or not the charges have been sustained. Even on questions of credibility, and despite the fact that the referee has had the witness before him and the Appellate Division sees no more than the bare record, that Court has frequently substituted its own judgment for that of the referee. *See, e.g., Matter of Kahn,* 38 A.D.2d 115, 123, 328 N.Y.S.2d 87, 95-96 (1st Dep't), *aff'd,* 31 N.Y.2d 752, 338 N.Y.S.2d 434, 290 N.E.2d 435 (1972).

Once the referee has rendered his report, the parties move before the Appellate Division to affirm or disaffirm it. While they may submit briefs, the Appellate Division neither takes new evidence nor hears oral argument. Instead it merely issues a ruling—which it need not (and generally does not) justify except in the most perfunctory and conclusory manner even when it disaffirms the referee's findings. The Appellate Division also imposes punishment which may vary from censure to disbarment with the concomitant loss of the right to practice law.

The right of appeal after an adverse finding by the Appellate Division in a disciplinary proceeding is so lim-

ited as to be virtually non-existent. Subsection 8 of §90 provides merely for an appeal as of right upon questions of law which directly involve the construction of the State or Federal Constitution or where one of the Appellate Division Justices dissent. Article VI, Section 3, New York State Constitution, 2 McKinney's (1968); New York CPLR §§5501 *et seq.*, 5601 *et seq.* 7B McKinney's (1963). Thus, as in the case at Bar and as in most cases, the Appellate Division's decision convicting an attorney of professional misconduct will not be reviewed by any court of the State of New York. *Matter of Flannery,* 212 N.Y. 610, 611, 106 N.E. 630 (1914); *Matter of Levy,* 255 N.Y. 223, 174 N.E. 461 (1931).

It must be emphasized that, so far as counsel is able to determine, attorneys convicted of professional misconduct in a disciplinary proceeding are the only class of litigants in the State of New York who are not accorded at least one appeal as a matter of statutory right. As the table annexed to Judge Weinstein's dissenting opinion below makes clear (104a-106a), New York guarantees not only civil and criminal litigants but all disciplinable professionals, except attorneys, at least *one* review as a matter of right on questions of law and fact.

It is submitted that the New York machinery for attorney discipline established by and pursuant to §90 offends the constitutional rights of attorneys accused of unprofessional conduct in at least six ways:

1. *The Appellate Division is not only the ultimate fact-finder, but through its instrumentalities, the judicial in-*

*quiry and its appointed referee, investigator, grand jury and prosecutor as well.**

2. *The only hearing accorded by statute to the attorney-respondent is essentially a meaningless formalism since, despite the elaborate panoply of investigator, prosecutor and referee, the findings of the referee are in no way binding upon the Appellate Division.*

3. *The statutory scheme denies the attorney-respondent any meaningful opportunity to be heard since the actual trial takes place not before the referee but before the Appellate Division sitting at* nisi prius.

4. *An attorney-respondent is denied any meaningful opportunity to be heard since the Appellate Division hears neither him nor his counsel nor his witnesses, but rather makes a decision solely upon the bare record.*

5. *Even on credibility questions the Appellate Division may substitute its judgment for that of the referee who actually saw and heard the witnesses. It may disaffirm the referee's report in whole or in part. It may make new findings of fact, but without giving any justification whatsoever, and whether or not those findings are supported by the record.*

6. *The discretion of the Appellate Division in affirming or disaffirming the report below, in entering findings of*

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* Precisely such a procedure has been recently condemned by the Appellate Division of another department:

> "Vague and meaningless regulations are promulgated, interpreted and applied by the same agency which then presides as the prosecutor, judge and jury over a governmental web impossible * * * to escape." *In re Gerald Levine d/b/a Westmere Convalescent Home,* Slip Op. at 5, —— A.D.2d ——, —— N.Y.S.2d —— (3rd Dep't January 22, 1976).

fact and in imposing punishment is absolute, final, and unreviewable no matter how capricious or arbitrary. In contrast to every other class of litigant in the State of New York, the disciplined attorney has no right to appeal.

It is respectfully submitted, therefore, that §90 of the Judiciary Law and the rules promulgated pursuant to it deny attorney-respondents in the New York State disciplinary process, due process of law and the equal protection of the law guaranteed to them (as to all citizens) by the XIVth Amendment to the United States Constitution.

II—The Failure of §90 to Accord Attorneys Accused of Professional Misconduct: the Right to Appear and Argue Before, and to Have Witnesses Heard by the Trier of the Facts; a Statement of the Trier's Reasons; and at Least One Appeal as of Right Denied Appellant Due Process of Law

Appellant starts from the proposition that "* * * lawyers also enjoy first class citizenship". *Spevack* v. *Klein,* 385 U.S. 511, 516 (1967) and that the United States Constitution "* * * extends its protection to the lawyers, as well as other individuals * * *". *Id.* at 514. While states and their courts have a concededly valid interest in an ethical bar and, therefore, must have the power to discipline attorneys, "[t]he power is one which ought to be exercised with great caution * * *". *Ex parte Burr,* 22 U.S. (9 Wheat.) 529, 531 (1824).

> "The power * * * is not an arbitrary and despotic one, to be exercised at the pleasure of the court * * * but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be scrupulous-

> ly guarded and maintained * * *". *Ex parte Secumbe,* 60 U.S. (19 How.) 9, 13 (1856).

While the supervision and discipline of attorneys is, therefore, properly vested in the judiciary of the State of New York, appellees have not been delegated an arbitrary power separate and different from the discretion they usually exercise. Rather, the duty of supervision of attorneys and its consequent power is merely a specific instance of the general delegation to the judiciary of the power and obligation fairly to arbitrate between the citizens of the State. The discretion and power involved in the disciplinary function is neither qualitatively nor quantitatively much different from that involved in, say, disposing of criminal or matrimonial matters. Appellees' disciplinary function is thus subject to the same checks and limitations that surround other exercises of judicial power.

> "The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *Johnson* v. *Avery,* 393 U.S. 483, 490 n.11 (1969).

A. Denial of a Meaningful Opportunity to Be Heard

Due process is, of course, a protean concept that requires in each case a "* * * determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961). A disciplinary proceeding against an attorney, however, carries with it a threat of such devastating sanction that this Court has characterized disbarment proceedings as being of a "quasi-criminal na-

ture". *In re Ruffalo*, 390 U.S. 544, 551 (1968). Thus, the private interest affected by a disciplinary proceeding is substantial indeed.

> "• • • [I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. [Citations omitted.] Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm a lawyer in his community and in his client relations, as well as adversely affect his ability to carry out his professional functions • • •". *Erdmann* v. *Stevens*, 458 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

While it takes no citation of case to establish the proposition that New York has a need, indeed an obligation to provide effective attorney discipline, the means by which it does so must be weighed against the significant private interests affected. And, therefore, the decisions of this Court teach that "• • • when a State seeks to • • • disbar a lawyer, it must proceed according to the most exacting demands of due process of law". *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154, 174 (1971) (Black & Douglas, JJ., dissenting).

No matter how closely one parses the concept of due process it is beyond dispute that at the minimum, the XIVth Amendment requires a full and fair opportunity to be heard, *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); and further, that the hearing "• • • must be granted • • • in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545,

552 (1965). This is particularly true when, as here, a person's good name, integrity, reputation or honor is at stake because of governmental action. *See, e.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); *Willner* v. *Comm. on Character and Fitness,* 373 U.S. 96 (1963); *Greene* v. *McElroy,* 360 U.S. 474 (1959).

And it is also clear that at the very least, a meaningful opportunity to be heard means an opportunity to appear before the trier of the facts for the purpose of argument, *Herring* v. *New York,* 422 U.S. 853 (1975); *United States* v. *Walls,* 443 F.2d 1220 (6th Cir. 1971); *United States* v. *Sawyer,* 443 F.2d 712, 713 n.5 (D.C. Cir. 1971) ("the defendant's right to present argument is part of his Sixth Amendment right to counsel * * *"); *United States ex rel. Wilcox* v. *Pennsylvania,* 273 F. Supp. 923 (E.D. Pa. 1967); *Williams* v. *Brooklyn Elevated R.R. Co.,* 126 N.Y. 96, 26 N.E. 1048 (1891); *Lyman* v. *Fidelity & Casualty Company,* 65 App.Div. 27, 72 N.Y.S. 498 (1st Dep't 1901); *New York* v. *Marcelin,* 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965). It means as well that the trier must be given an opportunity to evaluate the credibility of witnesses, *Dyer* v. *MacDougal,* 201 F.2d 265 (2d Cir. 1952); *United States ex rel. Graham* v. *Mancusi,* 457 F.2d 463 (2nd Cir. 1972); *Emsley* v. *State Bar of California,* 520 P.2d 99, 113 (Cal. Rptr. 175 (1974). *Cf. Barber* v. *Page,* 390 U.S. 719 (1968); *Berger* v. *California,* 393 U.S. 314 (1969); *Morgan* v. *United States,* 298 U.S. 468 (1936); *see, also, Lacomastic Corporation* v. *Parker,* 54 F.Supp. 138, 141 (D. Md. 1944).

But neither the statute here complained of, nor the rules promulgated pursuant to it provided appellant with

either of these important indicia of due process. This failure, it is submitted, is a fatal defect justifying the assumption of jurisdiction by this Court and reversal of the judgment below.

B. Statement of Reasons for Decision

Another defect in the statute is that it permits the Appellate Division to discipline or to disbar an attorney without giving the slightest reason to support its decision. In his dissent below, Judge Weinstein observed:

> "Minimal due process requires that a decision maker confine itself to the record, to the legal evidence adduced at the hearing, to the applicable rules of law, and to a sound exercise of discretion. Without any written statement from the decision maker, there is no assurance that these requirements are met." (68a-69a.)

While this Court has yet to hold that due process requires a written statement from the trier in a judicial proceeding, it has held due process to impose such a requirement in administrative proceedings. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

But the private interests at stake in an attorney disciplinary proceeding—a lawyer's license, reputation and livelihood—are just as important as the interests involved in *Goldberg* or *Morrissey.* Nor is the potential for abitrary or capricious governmental action any less in a disciplinary proceeding than it is in a welfare or parole revocation hearing. *See, United States* v. *Forness,* 125 F. 2d 928, 942

(2nd Cir.) (Frank, J.), *cert. denied sub nom., City of Salamanca* v. *United States,* 316 U.S. 694 (1942):

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards".

And see *Wood Wire & Metal Lath.* v. *United States,* 471 F.2d 408, 416 (2nd Cir.), *cert. denied,* 412 U.S. 939 (1973):

> "Due process requires that the facts upon which judgment is based be made known to the parties".

Moreover, a written statement of findings by the trier is as necessary to proper appellate review of judicial decisions as it is to review of administrative decisions. *See, United States* v. *Livingston,* 459 F.2d 797, 798 (3rd Cir. 1972); *Lemelson* v. *Kellogg Co.,* 440 F.2d 986, 988 (2d Cir. 1971), and cases collected therein.*

Accordingly, we submit that the same considerations that led this Court to require written findings in administrative proceedings should now lead it to require the same in judicial proceedings—at least in those non-jury proceedings (such as New York attorney disciplinary proceedings), in which punitive sanctions (such as loss of license or livelihood) may result. As the dissent observed below:

> "Those punished deserve to know why." (73a).

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* If this Court agrees that attorneys should have an appeal as of right on all questions in a disciplinary proceeding, then the need for a written statement is manifest. Appellate review cannot be had in its absence.

C. Denial of Appellate Review

Yet another due process defect in the statute complained of herein is its failure to accord an attorney-respondent anything other than the most illusory opportunity for appeal. While this Court has never held that a right of appeal is an essential element of due process, it has strongly suggested that where, as here, the *nisi prius* tribunal did not provide a full and fair hearing, the denial of appellate review is equivalent to a denial of due process.

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance.*" *Ohio ex rel. Bryant* v. *Akron Metropolitan Part District,* 281 U.S. 74, 80 (1930). (Emphasis added.)

See, also, Lindsey v. *Normet,* 405 U.S. 56, 77 (1972).

If it be conceded that a fair trial and a fair tribunal is a basic requirement of due process, *In re Murchison,* 349 U.S. 133, 136 (1955), then it follows that where a fair tribunal or a fair trial is not granted below, due process requires that it be granted above. But, the statutory scheme sought to be declared unconstitutional herein does not afford the attorney-respondent even one fair trial before any tribunal since, despite the fact that in disciplinary matters the Appellate Division sits at *nisi prius,* it neither hears testimony nor oral argument nor is it required to furnish any explanation for its decision.

Under these circumstances, the failure of the statutory scheme to afford at least one appeal as of right denied Ap-

pellant the opportunity to correct errors below. It made him subject to arbitrary and capricious determinations by the Appellate Division and thus denies him due process of law.

III—The Failure of §90 to Accord Disciplined Attorneys at Least One Appeal as of Right While Granting the Right of Appeal to All Other Litigants, Denied Appellant Equal Protection of the Law.

While, as noted above, this Court has yet to hold that any litigant has a constitutional right to an appeal, it has held that having granted a general right of appeal, a state may not arbitrarily deny that right to a particular class of litigants.

> "When an appeal is afforded * * * it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause". *Lindsey* v. *Normet,* 405 U.S. 56, 77 (1972).

See, also, In re Brown, 439 F.2d 47, 51 (3rd Cir. 1971); *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U.S. 37, 43 (1954).

But, as convincingly appears from Appendix B to Judge Weinstein's opinion below—"the Right to Appellate Review in New York" (104a-106a), of all the hundreds of classes of litigants in New York, only disciplined lawyers are not granted at least *one* appeal as of right on questions of law and fact from the tribunal of original instance. Indeed, every other disciplinable professional, including chiropractors, masseurs, accountants, and nurses, to name only a few, has a statutory right to appeal adverse deci-

sions of the New York Board of Regents to the Appellate Division, Third Judicial Department, New York Education Law §6510(4), 16 McKinney's (1972), and to obtain review of all questions of law and facts according to the substantial evidence standard. *See, e.g., Corwin* v. *Nyquist,* 37 A.D.2d 656, 355 N.Y.S.2d 405 (3rd Dep't 1971).

Attorneys, in contrast, have no such rights. Pursuant to the statute herein complained of, attorneys are entitled to a review as of right only where the Court of Appeals finds constitutional questions controlling or (semble) where there is a dissent at the Appellate Division level. New York Judiciary Law §90(8), 29 McKinney's, New York CPLR §5601, 7B McKinney's (1963). And even if such an appeal be granted, its scope is severely limited. While it may review questions of constitutional law, it is required to affirm disciplinary decisions as long as there is *"some evidence"* to support it, whether or not such evidence is worthy of any weight. *Matter of Flannery,* 212 N.Y. 610, 106 N.E. 630 (1914) (emphasis added).

This right of appeal although not required generally as a matter of constitutional due process has been perceived by many distinguished commentators (including one of the appellees herein) as an essential part of our system of jurisprudence:

> "The notion is firmly rooted that a litigant is entitled to at least one review of an adverse final decision." Hopkins [Honorable James D.], "The Role of an Intermediate Appellate Court", 41 BROOKLYN L. REV. 459, 463 (1975).

See, also, Matter of Luckenbach, 303 N.Y. 491, 104 N.E.2d 870 (1952); *Handy* v. *Butler,* 183 A.D. 359, 169 N.Y.S. 770 (2d Dep't 1918).

Appellant does not urge that the state is required to treat all litigants, or even all professionals, identically. Concededly there are distinctions between various classes of litigants and those distinctions may rationally lead to different types of treatment being accorded to them. However, it is appellant's position that there is no *rational* basis for treating an attorney-appellant differently from all other classes of appellants and that in the absence of a rational relationship to legitimate governmental objective, treating or classifying attorneys separately denies them equal protection of law.

> "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objects of the legislation so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

See, also, Semler v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 610 (1935).

In an attempt to posit some sort of rational basis for Section 90's discrimination against attorneys, appellees argued and the Court below adopted, three justifications which purported rationally to support the discrimination inherent in the statutory scheme:

1. The state may properly regulate different professions in different ways;

2. The initial decision against attorneys (in distinction to other professionals) is rendered by a court, rather than an administrative body; and

3. Denial of appeals to attorneys insures swift discipline.

Appellant respectfully urges that none of these purported rationales provide any basis upon which to deny attorneys, and attorneys alone, a right of appeal from adverse disciplinary decisions.

Conceding, *arguendo,* that as appellees argued below, attorneys are somehow different from other classes of professionals and, assuming further that a state may well treat different classes of professionals differently, appellees still have failed to supply a *rational* basis for treating attorneys differently than, say, accountants or teachers or physicians. They have failed to suggest a single factor which even remotely establishes that there is some characteristic peculiar to being an attorney which justifies the denial of a right granted to a veterinarian, chiropractor or masseur.

And, in any case, even if a state may treat different professions differently, it may not treat different litigants differently by denying to some the procedural rights that it grants to all others. *Lindsey* v. *Normet, supra; cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

Appellant's second purported justification—that attorneys do not need review since their tribunal of original instance is a Court rather than an administrative body,

is even less justifiable. There is nothing in this record to suggest that disciplinary determinations rendered by the New York State Board of Regents in non-attorney cases are any more prone to error than the initial judicial determination rendered by the Appellate Division in attorney discipline cases. If anything, New York's statutory law suggests exactly the opposite since, in most cases, the scope of review from an administrative determination is limited to whether or not there was substantial evidence to support the determination below. *See,* CPLR §7803(3), 7B McKinney's (1963). However the scope of the initial review of a *judicial* determination in New York State (except in attorney discipline cases) extends to all questions of law and fact, CPLR §5501(c), CPLR §5501(d), 7B McKinney's (1963), Court of Claims Act §24, 29A McKinney's (1963), Criminal Procedure Law §470.15(1), 11A McKinney's (1971).

Finally, the need for swift discipline—appellees' third purported justification—is no justification at all and was amply and succinctly disposed of below by Judge Weinstein:

> "* * * [A]ll professionals and other citizens who deviate from prescribed standards of conduct must be disciplined swiftly and effectively to protect the public from fraud and other harm. Yet the state fails to give any reason why only allegedly deviant attorneys must be denied the right of Appellate review." (96a.)

Conclusion

For all the foregoing reasons, this Court should accept jurisdiction of the appeal and reverse the decision below.

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Respectfully submitted,

ANGELO T. COMETA
Attorney for Plaintiff-Appellant
40 West 57th Street
New York, New York 10019

Of Counsel:
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
KENNETH DAVID BURROWS